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NOV 2 2004
RECEIVED

October 27, 2004

Re: STB Finance Docket No. 34486; Ohio Valley Railroad Company-Acquisition and Operation Exemption – Harwood Properties, Inc.; Reply of Ohio Valley Railroad Corporation to Indiana Southwestern Railway Company's Motion to Reconsider Petition to Reject or Revoke

Hon. Vernon A. Williams
Secretary, Surface Transportation Board
Mercury Bldg., #711
1925 K Street, N.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings

NOV 2 2004

Part of
Public Record

Dear Secretary Williams:

Enclosed please find for filing an original and ten (10) copies of the Reply of Ohio Valley Railroad Corporation to Indiana Southwestern Railway Company's Motion to Reconsider Petition to Reject or Revoke Reply.

Please time stamp the extra copy of this letter to indicate receipt, and return it to me in the stamped self-addressed envelope provided for your convenience.

Very truly yours,

VUONO & GRAY, LLC



Richard R. Wilson, Esq.

RRW/bab

Enclosures

xc: Ohio Valley Railroad Company

34673
EB

SERVICE DATE - SEPTEMBER 28, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34486

OHIO VALLEY RAILROAD COMPANY
- ACQUISITION AND OPERATION EXEMPTION -
HARWOOD PROPERTIES, INC.

Decided: September 24, 2004

Ohio Valley Railroad Company (OVR) has filed a notice of exemption to acquire and operate certain trackage in Evansville, IN. Indiana Southwestern Railway Co. (ISW) requests that we reject the notice or revoke the exemption, or, in the alternative, that we stay the effective date of the exemption. For the reasons set forth below, we will deny ISW's petition to reject or revoke, and will dismiss as moot ISW's request for a stay.

BACKGROUND

By verified notice filed on March 23, 2004, and served and published in the Federal Register on April 22, 2004 (69 FR 21899), OVR, a noncarrier, invoked the Board's class exemption procedures under 49 CFR part 1150 subpart D to acquire by lease from Harwood Properties, Inc. (also a noncarrier), and operate as a common carrier approximately 2.8 miles of what appears to have been switching, industrial, or private track in the former Harwood Yard in Evansville, IN. The track that OVR would operate pursuant to the notice connects with lines operated by ISW. Under the terms of the class exemption procedures, the exemption became effective on March 30, 2004. In its notice, OVR stated that it anticipated that it would begin common carrier operations on or after March 30.

By letter filed on March 26, 2004, CSX Transportation, Inc. (CSXT), while stating that it takes no position in the proceeding, requests that we review OVR's proposal carefully to determine whether OVR will actually operate as a common carrier subject to our jurisdiction by virtue of the proposed transaction, or whether it merely will be a private switching company providing non-common carrier service. OVR responded to CSXT's submission on April 6, 2004. In its response, OVR disputes CSXT's suggestion that OVR might not become a common carrier, and confirms its intention to provide common carrier service over the subject trackage.

On April 15, 2004, ISW filed a petition to reject the notice or revoke OVR's exemption, or to stay the effectiveness of the exemption. ISW argues that OVR's notice of exemption is defective and misleading and that it is therefore void ab initio. Although it concedes that the class exemption procedures should be available in some instances where the transferor of the trackage is a noncarrier, ISW argues that we should restrict the use of the class exemption in

EXHIBIT A

DISCUSSION AND CONCLUSIONS

Under the licensing provisions of 49 U.S.C. 10901, a noncarrier (such as OVR) may file an application to acquire and operate a rail line. For an application to be granted, the proposed transaction must be found not to be inconsistent with the "public convenience and necessity." Under 49 U.S.C. 10502 and 49 CFR 1121, however, a party may file a petition for an exemption from the formal application procedures of section 10901 on the grounds that: (1) full regulatory scrutiny is not necessary to carry out the rail transportation policy, and (2) either the exemption is limited in scope or regulation is not needed to protect shippers from an abuse of market power.

There are some situations in which approval would be so routine and noncontroversial that there is an expedited "class exemption" procedure allowing parties to obtain Board authorization subject only to an after-the-fact Board review if objections are received. Thus, under 49 CFR part 1150 subpart D, a noncarrier, under certain circumstances, can obtain authority to acquire and operate a line of railroad within 7 days. That authority can be revoked later under 49 U.S.C. 10502(d) should such action be necessary to carry out the transportation policy of 49 U.S.C. 10101. Alternatively, the exemption notice may be treated as void ab initio and rejected if it contains false or misleading information. See Class Exemption — Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810, 812 (1985), aff'd sub nom. Illinois Commerce Comm'n v. ICC, 817 F.2d 145 (D.C. Cir. 1987). Moreover, the Board has held that the informal, streamlined class exemption process is unsuited for cases in which the record reveals that a more searching review of the proposed transaction would be appropriate. See, e.g., James Riffin d/b/a The Northern Central Railroad — Acquisition and Operation Exemption — In York County, PA, and Baltimore County, MD, STB Finance Docket No. 34484 (STB served Apr. 20, 2004); Riverview Trenton.

ISW challenges OVR's use of the class exemption procedures here because it claims OVR has not shown that its operations over the track require Board authorization. But, ISW has failed to demonstrate that OVR's notice is either incomplete or inaccurate, and there is no evidence that the information it contains is false or misleading. In addition, ISW's argument that we should read additional requirements into the class exemption process for cases such as this one is unavailing. Our regulations do not require that the notice filer explain why it has chosen to seek Board permission to engage in a particular transaction. ISW questions whether OVR will operate as a common carrier. But the record reflects that OVR intends to function, and to hold itself out to the public, as a common carrier over that trackage, and there is no evidence showing that OVR could not fulfill the common carrier duties that it would assume pursuant to the transaction.

Moreover, although the Harwood Yard trackage previously may have been used by another carrier either as switching/industrial track excepted from our licensing authority or private track entirely beyond our jurisdiction, that same trackage will now constitute OVR's entire line of railroad over which OVR will hold itself out to the public as a common carrier.

Thus, the legal status of the subject track can change and has changed. See Effingham Railroad Company – Petition for Declaratory Order – Construction at Effingham, IL, 2 S.T.B. 606 (1997), aff'd sub nom. United Transp. Union v. STB, 183 F.3d 606, 613 (7th Cir. 1999); Yolo County. OVR therefore required Board authorization to commence common carrier operations and properly sought that authorization here.

ISW's reliance on Jefferson Terminal, Riverview Trenton, and Yolo County as support for its petition to reject or revoke is misplaced. Those three cases involved circumstances that differ substantially from those present here, and thus they do not mandate the relief sought by ISW. Specifically, in Jefferson Terminal and Riverview Trenton, the communities affected by the proposed transactions argued that the applicants were invoking the class exemption procedures to obtain Board authority in order to trigger federal preemption and to defeat ongoing or anticipated condemnation proceedings involving the properties in question. In both cases, the Board concluded that, in light of the parties' concerns that the applicant might be using the Board's expedited licensing procedures to thwart local objectives to use the property for other purposes, a more searching review of the proposed transaction was warranted than could be undertaken under the class exemption process.

In Yolo County, the Board rejected a railroad's notice of exemption that effectively would have converted that carrier's switching operations over port-owned facilities to common carrier operations. In rejecting the notice, the Board observed that the incumbent railroad had "filed its notice of exemption in an attempt to avoid being forced to discontinue its operations over [the port's] trackage" pursuant to a private agreement between the port and another railroad that would replace the incumbent as the exclusive operator of the trackage. Id. at 1-2. Noting that the incumbent railroad's notice of exemption did not envision any change in operators or its own operations over the port's trackage, the Board stated that the incumbent railroad appeared to be using the agency's procedures not to facilitate changes in the railroad's service or its relationship to shippers located on the port-owned trackage, but, rather, merely to "frustrate the terms of a private contract" between the port and another railroad. Id. at 5.

Here, unlike in the cases it cites, ISW has not provided any evidence or expressed any specific concerns indicating that the purpose of this transaction is an improper one or that a more searching review is necessary. Furthermore, ISW does not demonstrate that OVR's activities could only be regarded as switching operations under 49 U.S.C. 10906 or unregulated private track operations. Because ISW has not shown that OVR's notice of exemption is defective, misleading, or inadequate, has provided no evidence to indicate a possible abuse of our processes, and has not otherwise demonstrated a need for regulatory scrutiny, we will deny ISW's petition to reject or revoke.

In light of our decision denying ISW's petition, we will dismiss as moot ISW's request for a stay.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. ISW's petition to reject the notice or revoke the exemption is denied.
2. ISW's petition for stay is dismissed as moot.
3. This decision is effective on its date of service.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams
Secretary

Apr 13 04 03:13P

FT ISW 8000-E
(Cancels 8000-D)

INDIANA SOUTHWESTERN RAILWAY CO.

FREIGHT TARIFF ISW 8000-E (Cancels ISW 8000-D)

NAMING RATES AND CHARGES COVERING SWITCHING

BETWEEN	AND
ALL STATIONS ON THE ISW	INTERCHANGE WITH CONNECTIONS AT EVANSVILLE, IN

GENERAL SWITCHING TARIFF

This tariff is also applicable on intrastate traffic, except where expressly provided to the contrary in connection with Particular Items.

ISSUED: April 13, 2004, 2003

EFFECTIVE: APRIL 14, 2004

ISSUED BY:

Catherine Busch, Director of Marketing
INDIANA SOUTHWESTERN RAILWAY CO.
1318 So. Johanson Road
Peoria, IL 61607

(The provisions published herein, if effective, will not result in an effect on the quality of the human environment.)

EXHIBIT B

FT ISW 8000-E

(Cancels FT ISW 8000-D)

**RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS****ITEM 5 SUPPLEMENTS AND REISSUES**

When reference is made in this tariff, or supplements, to other publications for rates or other information, it includes "Supplements" thereto or successive issues thereof.

As this tariff is supplemented, numbered items with letter suffixes cancel correspondingly number items in the original Tariff, or in a prior supplement. Letter suffixes will be in Alphabetical sequence starting with A. Example: Item 100A cancels Item 100; and Item 300-B cancels Item 300-A in a prior supplement, which in turn cancelled Item 300.

ITEM 25 MILEAGE CHARGES ON PRIVATELY OWNED CARS

The ISW will not pay any mileage charges on privately owned or leased equipment when moving from, to, or via stations on the ISW.

**ITEM 30 CAR DEMURRAGE, DETENTION AND STORAGE
RULES AND CHARGES**

For rules and charges to apply, See Freight Tariff ISW 6004 series and Freight Tariff ISW 8998 series.

ITEM 40 NON-ABSORBED INTERMEDIATE SWITCH RATE

The rates listed herein do not absorb the intermediate switch rate between CSXT and NS. The ISW interchanges directly with CSXT at Evansville, IN.

**SECTION 1
SWITCHING****ITEM 1000 INTERCILANCE SWITCHING**
(See Notes 1, 2, 3, 4, 5, 6 and 7 for this item)

The Indiana Southwestern Railway Co. (ISW) will perform switching between industries located at stations shown below and interchange with CSXT (Direct) and NS (via intermediate switch) at Evansville, IN at the

Charges indicated below:

(Charges are in Dollars and Cents per Cars, unless otherwise noted)

STATION	INDUSTRY	COMMODITY	INTERCHANGE	CHARGE
Evansville, IN	Mid America Locomotive and Car Repair Shop	Rail cars (other than locomotives, cabooses, and passenger cars)	CSX	\$ 250.00
			NS	(includes in & out) \$ 250.00
		Locomotives	CSX	(includes in & out) \$1,500.00
			NS	(includes in & out) \$1,500.00
		Cabooses and Passenger cars	CSX	(includes in & out) \$1,000.00
			NS	(includes in & out) \$1,000.00

Note 1: These charges apply only when customer is physically served by ISW. Intermediate switch charges will apply as noted in Item 7000.

Note: Switch charges for empty railcars, locomotives, and passenger cars will be billed to Mid America Locomotive at first move by ISW. Switch charge monies are due and payable to ISW within 15 days of receipt of invoice, and/or all charges to be "PAID IN FULL" prior to rail cars moving offline.

*Loaded cars destined to Mid America Locomotive for the account of GE Plastics, will incur the \$250 switch charge with charges due and payable as follows: \$200.00 of the switch charge will be assessed against and billed to CSX; \$50.00 will be assessed against and billed to Mid America Locomotive. All switch charges will be billed at time of the inbound move or upon first move by ISW.

Cars will not be considered released, AND NO CARS WILL MOVE OFF LINE UNTIL ALL CHARGES FOR SERVICES ARE "PAID IN FULL".

SECTION 1 SWITCHING (continued)

ITEM 1000 - continued

INTERCHANGE SWITCHING (See Notes 1,2,3,4,5,6 and 7 for this item)

STATION	INDUSTRY	COMMODITY	INTERCHANGE	CHARGE
Evansville, IN	GE Plastics	Loads being held in storage on ISW owned tracks (Contribution to Mt. Vernon, IN)	CSX	\$ 200.00 (includes in & out)

Note: Charges for switching of empties being held in storage as well as storage charges will be billed to GE Plastics.

Evansville, IN	All Other Industries	Freight, all kinds, except fertilizer and grain - See Note 7	CSX NS	\$ 530.00 \$ 530.00
Poseyville, IN	All Industries	Freight, all kinds, except fertilizer and grain - See Note 7	CSX NS	\$ 530.00 \$ 530.00
Cynthiana, IN	All Industries	Freight, all kinds, except fertilizer and grain - See Note 7	CSX NS	\$ 530.00 \$ 530.00

Note: The above charges apply only when customer is physically served by ISW. Intermediate switch charges will apply as noted in Item 2000.

ITEM 2000

INTERMEDIATE SWITCHING RATES

Application and Definition of Intermediate Switching

A switching movement of cars from the interchange tracks of one connecting carrier to the interchange tracks of another connecting carrier with the switching limits of the same station on which the switch carrier neither originates nor terminates the shipment nor receives a line-haul.

Charges Indicated Below:

(Charges are in Dollars and Cents per car, unless otherwise noted.)

STATION	COMMODITY	RATE
Evansville, IN	Freight - All Kinds, not including cabooses, passenger cars and locomotives. Also - See Note 7.	\$ 250.00
	Locomotives	\$1500.00
	Cabooses and Passenger Cars	\$1000.00

Note: Rates apply in each direction on all movements, loaded or empty. Such charge will be assessed against the carrier handing off the car to the ISW, and will apply on loads and empties.

Note 1 - On all moves involving loaded cars, switch charges will be assessed against and billed to the connecting carrier.

See exception * for loaded cars moving to Mid America for account of GE Plastics.

Note 2 - No switching charges of the line haul charges will be absorbed by the ISW.

Note 3 - For cars moving to/from ISW, intermediate switch charges for cars moving between NS and CSX at Evansville, IN will not be absorbed by the ISW.

Note 4 - All charges will be "paid in full"; or acceptable arrangements will have been made for payment prior to final movement (inbound/outbound) of rail cars on/off ISW.

Note 5 Subject to Rule 5 - Switching Car Hire Expense recovery - Code of Car Hire Rules and Interpretation as published in the Official Railway Equipment Register - Circular O-1 - 10.

Note 6 - For grain switching rates to apply, see Freight Tariff ISW 8001. For fertilizer rates to apply, see Freight Tariff ISW 8102.

Note 7 - Above switch charges do not cover dimensional hi-wide loads/heavy loads/loads requiring lvy duty or special equipment. Contact ISW Marketing for charges (304) 697-1400.

Attn: Bruce Wright

812-421-1770

FT ISW 8000-F
(Cancels 8000-E)

INDIANA SOUTHWESTERN RAILWAY CO.

FREIGHT TARIFF ISW 8000-F
(Cancels ISW 8000-E)

NAMING
RATES AND CHARGES
COVERING
SWITCHING

BETWEEN	AND
ALL STATIONS ON THE ISW	INTERCHANGE WITH CONNECTIONS AT EVANSVILLE, IN

GENERAL SWITCHING TARIFF

This tariff is also applicable on intrastate traffic, except where expressly provided to the contrary in connection with Particular items.

ISSUED: October 12, 2004	EFFECTIVE: November 1, 2004
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ISSUED BY:
Catherine Busch, Director of Marketing
INDIANA SOUTHWESTERN RAILWAY CO.
1318 So. Johanson Road
Peoria, IL 61607

(The provisions published herein, if effective, will not result in an effect on the quality of the human environment.)

FT ISW 8000-F
(Cancels FT ISW 8000-E)

RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS

ITEM 5 SUPPLEMENTS AND REISSUES

When reference is made in this tariff, or supplements, to other publications for rates or other information, it includes "Supplements" thereto or successive issues thereof.

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(Charges are in Dollars and Cents per Cars, unless otherwise noted)

STATION	INDUSTRY	COMMODITY	INTERCHANGE	CHARGE
Evansville, IN	Mid America Locomotive and Car Repair Shop	Rail cars (other than locomotives, cabooses, and passenger cars)	CSX	\$ 250.00 (includes in & out)
			NS	\$ 250.00 (includes in & out)
		Locomotives	CSX	\$2,500.00 (includes in & out)
			NS	\$2,500.00 (includes in & out)
		Cabooses	CSX	\$1,000.00 (includes in & out)
			NS	\$1,000.00 (includes in & out)
		Passenger Cars	CSX	\$2,500.00 (includes in & out)
			NS	\$2,500.00 (includes in & out)

Note 1: These charges apply only when customer is physically served by ISW. Intermediate switch charges will apply as noted in Item 2000.

Note: Switch charges for empty railcars, locomotives, and passenger cars will be billed to Mid America Locomotive at first move by ISW.

Switch charge monies are due and payable to ISW within 15 days of receipt of invoice, and/or all charges to be "PAID IN FULL" prior to rail cars moving offline.

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SECTION 1
SWITCHING
(continued)

ITEM 1000 - continued

INTERCHANGE SWITCHING
(See Notes 1,2,3,4,5,6 and 7 for this item)

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			NS	\$ 530.00
Cynthiana, IN	All Industries	Freight, all kinds, except fertilizer and grain - See Note 7	CSX	\$ 530.00
			NS	\$ 530.00

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Charges Indicated Below:

(Charges are in Dollars and Cents per car, unless otherwise noted.)

STATION	COMMODITY	RATE
Evansville, IN	Freight All Kinds, not including cabooses, passenger cars and locomotives. Also - See Note 7	\$ 250.00
	Locomotives	\$2500.00
	Passenger Cars	\$2500.00
	Cabooses	\$1000.00

Note: Rates apply in each direction on all movements, loaded or empty. Such charge will be assessed against the carrier handing off the car to the ISW, and will apply on loads and empties.

- Note 1 - On all moves involving loaded cars, switch charges will be assessed against and billed to the connecting carrier. See exception * for loaded cars moving to Mid America for account of GE Plastics.
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